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IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

Abstract

LEAVERNE C. WEAVER,
Plaintiff-Appellant,
vs.
ILLINOIS BELL TELEPHONE
COMPANY, a corporation,
and ROLAND L. KELSEY,
Defendants-Appellees.

Appeal from the Circuit
Court of McHenry County,
Illinois.

MR. JUSTICE SEIDENFELD DELIVERED THE OPINION OF THE COURT:

Plaintiff appeals from judgments entered on not guilty verdicts in favor of defendants on trial of a complaint for personal injuries.

Plaintiff does not complain that the verdicts are against the manifest weight of the evidence, but argues that they resulted from a number of prejudicial errors. The errors claimed are that the verdict of the jury and the signing of the special interrogatory were the result of coercion; that the court erred in excluding certain rebuttal testimony, in instructing the jury, and in permitting prejudicial closing argument by the defendants.

Plaintiff testified that, at the time of the accident July 6th, 1961, he was driving a motorcycle on Route 14 northwest of the City of Woodstock in a southerly direction. He had been up that morning at 6:30 A.M. and had worked the day, finishing



about 5:30 P.M. He had a 12-oz. bottle of beer with his supper at home, then mowed the grass. He then took off on his motorcycle for a meeting of the State Line Riders, his motorcycle club, held in Harvard at the Wayside Inn.

He arrived there at approximately 8:00 P.M. and during the meeting he had some draught beer to drink. Plaintiff testified that he left the meeting about 10:30 P.M.

The group of motorcyclists then drove around the countryside arriving at a Hartland tavern, Hartland, about two hours later. Plaintiff had one small bottle of beer there and left at closing, which was shortly after midnight. He drove his motorcycle over the Hartland black top road to Route 14 and then started in a southeast direction on Route 14 towards Woodstock. He was going possibly 60 to 65 miles per hour.

He went over a hill and around a curve when about one and a half or two blocks ahead of him going in the same direction he could see a pickup truck. He could see the headlights of the truck and fluorescent paint on the back tailgate of the truck and rear reflectors, but he said he did not observe any lighted taillights. He flashed his headlight from high to low beam three or four times and then pulled off into the left lane to pass the pickup truck. He was about 100 feet behind the truck when he started to pass and testified that when he got into the lefthand lane the truck pulled across the center line to make a left turn. He then tried to hit his brakes and gear down and go to the right of the truck, but hit the back end of the truck.

He testified that he was going 50 to 60 miles per hour at the time he hit the truck; but testimony was elicited on cross-examination that he had not slowed down from the 60 to 65 miles per hour he had been traveling. Further testimony was elicited

that shortly prior to the place of the impact he saw a sign reading "Speed Zone Ahead 40 MPH", but that he did not slow down. He also testified on cross-examination that when he went past the speed sign it would take him 500 to 600 feet at the 60 miles an hour he was going to stop his motorcycle. He further testified that going at that speed within a distance of 100 feet he could turn his motorcycle to change direction and thus go 6 to 8 feet to one side or the other.

Marvin Drake, a witness for the plaintiff, testified that he was staying at the Lamplighter Motel in Woodstock on the night of the accident, and hearing a noise, went outside and saw the pickup truck in the driveway. The driver said to him "I was confused by the Woodstock airport sign and I was trying to find the entrance to the motel and I got turned in at the wrong place." He observed the rear of the truck and saw the back bumper and tailgate were caved in and there were no lights on the rear of the truck. He stepped off a single skid mark on the east side of the road which was on the east side of the center line running roughly parallel to the center line, at a distance of 4 or 5 feet, to a length of approximately 36 feet.

Another witness for the plaintiff, Dayle Moody, who was also staying at the motel, testified that after he heard the accident he went outside, saw the truck and saw that the rear end of it was pushed in, but he did not observe whether there were any lights on the rear of the truck.

Rudolph Albores, a traffic engineer for the State Highway Division, testified for the plaintiff that at the scene of the accident there was no posted speed limit on the highway. He further testified that there was a sign reflecting the speed zone ahead. He could not testify to the exact location of the sign,



but said that it means that at a distance of approximately 1000 feet in advance of the sign there would be a posted speed limit. He testified that "Speed Zone Ahead" and "40 MPH" are two separate signs which appear as a whole sign on one post.

Glen Vermitt testified for the plaintiff that he was a deputy sheriff for McHenry County responding to a call regarding the accident, and that on arrival he observed skid marks from the motorcycle which angled back towards the center line where the motorcycle came to rest. There was a skid mark which was 54 feet long from the middle of the northbound lane and angled towards the center of the highway where it terminated where the motorcycle was. There was glass and other debris on the highway where the motorcycle was lying.

The defendant Kelsey testified that he was working for the Illinois Bell Telephone Company on a special assignment installing telephones. He worked until 5:00 o'clock and then drove the company pickup the approximate 2 or 3 miles from the Telephone Company garage to the motel. After that he had driven back to Woodstock with two friends where they had dinner and were in several taverns after dinner. They were driving back to the Lamp-lighter Motel at approximately midnight on July 7th. He had noticed that in the use of the pickup truck that the headlights were operating, but he didn't pay any particular attention to the taillights. He testified he was going 20 to 25 miles an hour as he approached the motel, and then he slowed down to turn. He then turned on the turn signal, but he didn't pay any particular attention to whether it was flashing or not. He looked in both the rear view and side view mirror and didn't see anything. At that time he was 100 to 125 feet from the north entrance of the motel. The truck was in the southbound lane on the west side of



the center line. He then traveled 50 to 75 feet, and there was a jolt in the rear. He stopped the truck to see what had happened and discovered that the plaintiff had run his motorcycle into the rear of the pickup truck. Defendant further testified that from the White Swan Tavern (plaintiff had testified to observing the speed zone sign after he passed the White Swan Tavern) it was two-tenths of a mile to the Lamplighter Motel on a gradual incline traveling in a southerly direction, and the top of the incline was approximately 200 to 300 feet from the entrance of the motel.

George Mohr, a passenger in the pickup truck, testified that as they were approaching the Lamplighter Motel they were going approximately 20 to 25 miles per hour and that Kelsey turned on the turn signal, and he heard the clicking sound of the flasher. He felt a thud against the back end of the truck just before the turn was made. He testified that the truck was still in the south-bound lane when the thud occurred.

Gary Kanner, another passenger in the truck, testified that earlier in the evening he had looked out of the back of the truck as it was backing up, and he saw a reflection of taillights of the truck on the car behind him. His testimony also was that at the time of the accident the truck was still in the southbound lane.

Gordon Botts testified for defendants that at the request of the Telephone Company he had examined the pickup truck on July 8th, 1961, and found that the wires to the rear lights were not intact and that they were broken. He further testified that he did not do any repair work on the truck but that the truck had been repaired by Woodstock Body.

Plaintiff called the owner of the Woodstock Auto Body Shop, Charles Friedel, in rebuttal, and he testified that he did not do

any repair of any nature to the lighting system, and that at the time he completed the work on July 25th, 1961, the taillights and headlights were all in operating condition.

Lawrence Landram also testified in rebuttal that he was an employee of the Ford Motor Company in their Melrose Park service department, and was familiar with the wiring and circuitry of the 1961 pickup. He testified that if the wires leading to the lights in the rear were severed, that the right rear light would go out and not function, but that the left rear would continue to function. He further testified that if the connections were loose to a point where they did not make contact, then the lights on the rear of the vehicle would not operate.

Plaintiff then attempted to call Raymond Hills, who was employed by the Telephone Company as a plant service foreman, to establish that the plant motor foreman and the building foreman, who have the responsibility for the maintenance of the vehicles, were still employed by the Telephone Company. The court refused to admit the testimony. An offer of proof was denied which consisted of the testimony of Hills: that a Mr. Mansfield and a Mr. Crossman were in charge of the maintenance and vehicles at the Woodstock garage of the Illinois Bell Telephone Company during the period in question; and that prior to the accident Jackson, another employee of the company, had been regularly assigned to the truck; that there was a custom and practice of the company with respect to the duties and responsibilities of drivers in checking vehicles used by them - the duty of regularly checking them for safety including lights; that the witness did not know if a maintenance record was kept; and that Jackson lives in Woodstock and is employed by the Telephone Company at this time.

Also in rebuttal plaintiff read into evidence answers to interrogatories made by the defendant, Illinois Bell, which stated that no repairs had been done to the lighting system of the truck.

In addition to the general verdict of not guilty, the jury answered a special interrogatory that the plaintiff was guilty of contributory negligence which was a proximate cause of his injuries.

In support of a motion for a new trial the plaintiff submitted his own affidavit and the affidavit of the jury foreman and a member of the jury, which taken together were to the effect that after several hours of deliberation the jury had, in effect, disagreed 11 to 1 for a not guilty verdict, and that the court bailiff, upon being advised, told the foreman in earshot of the other jurors that, "The judge said this case has to be decided tonight", or that "The judge said this case has to be decided", or "You have to stay until this case is finished", or "The judge said you must decide the case today". The one juror although signing the verdict after this refused to sign the special interrogatory and her affidavit alleged that she was brought before the judge who told her "I am not going to listen to this nonsense. This case has to be decided". The remarks were alleged to have been made outside the presence of the attorney for the plaintiff who had left after signing a stipulation waiving the polling of the jury.

On motion, the trial court struck the affidavits and denied the motion for a new trial.

We first consider whether the verdict of the jury and the signing of the special interrogatory were the result of coercion. Plaintiff argues that both were the result of improper comments by the bailiff and by the court and that evidence of a coerced verdict may properly be shown by affidavits of jurors. Plaintiff agrees that the law in Illinois does not permit the use of jurors' affidavits to impeach a verdict, but argues that such affidavits



may be used to show, not the secret deliberations, but the external factors bearing on the signing of the verdict; and that, in any event, no reason is evident for the refusal of the affidavit of the plaintiff himself.

Our law contemplates that no extra - judicial influences may be brought to bear upon a jury, and if there has been such misconduct which results in prejudicing a verdict, a new trial will be granted. See Anno. 41 A.L.R. 2d 288; Loucks v. Pierce, 341 Ill. App. 253, 258 (1950). While there is some dicta to the contrary (See Larsen v. Chi. Union Traction Co., 131 Ill. App. 286, 292 (1907); Spurck v. Crook, 19 Ill. 415, 425 (1858)), it appears that in those Illinois cases where the question has been directly raised, affidavits of jurors cannot be used to impeach a verdict for alleged coercion by a judge or court personnel such as bailiffs. Sanitary District v. Cullerton, 147 Ill. 385, 390 (1893); Ruiter v. Knudson, 318 Ill. App. 211, 213 (1943); Palmer v. Poynter, 24 Ill. App. 2d 68, 73 (1960).

The rule is subject to an exception, not applicable here, when it is charged that a juror has answered falsely on voir dire about a matter of potential bias and prejudice. Dept. Public Wks. & Bldgs. v. Christensen, 25 Ill. 2d 273, 279 (1962).

We, therefore, believe that the trial judge properly struck the affidavits of the juror and the jury foreman. However, the rule barring the use of affidavits of jurors to show coercion of their verdict in the interest of avoiding interminable litigation, would not apply to the affidavit of the plaintiff Weaver as to what he observed in the courtroom, and we will consider that on the issue.

First, as to the bailiff's alleged remark, the affidavit of Weaver states:

The bailiff, x x x went to the door and when it was opened he said: "Are you

close?". A juror said something but I could not hear what was said. (The bailiff) then said, "The judge said this case has to be decided tonight".

It was further alleged that the bailiff emphasized the word has and said, "I am going to call the judge".

While, if the statement was made, it should not have been, we do not believe that it purports to carry with it any threat or coercion sufficient to prejudice or affect the jurors in favor of or against either party to the cause. Larsen v. Chi. Union Traction Co., supra, at 292. In Larsen the bailiff answered a question by certain of the jurors as to the length of time they would be detained by saying, "Such a thing as a disagreement is not known in this court", and that "The court had on one occasion held a jury 64 hours because they would not agree". This was held insufficient to prejudice the jury. In Ruiter v. Knudson, supra, after coercion was charged, the bailiff testified that, when advised at 3:00 P.M. that the jury could not agree, he said his instructions were to hold them until 5:00 P.M. A new trial was held properly not to have been ordered. We find no authority in the case of Heston v. Neathammer, 180 Ill. 150 (1899), cited by plaintiff, as the facts in that case are much different than here. There the bailiff remained in the jury room all night while the case was being deliberated, argued with and threatened the jurors and engaged in similar misconduct, all in the jury room.

With reference to the action of the trial court, the affidavit of Weaver states that when the judge did arrive some time later he sat on the bench and the bailiff went to the jury room door, knocked and when it was opened said, "The judge is here; come on out"; that the bailiff escorted the jury and lined them up along the rail and that the judge then said, "Who is the foreman?". The foreman answered and the judge asked him, "Have you reached a verdict?", and the foreman replied, "Yes". The

affidavit continues that the papers were brought to the judge, who looked at the papers and said, "You didn't do what I told you to do. I told you to sign both of these papers. You haven't signed this paper. This one will have to be signed". The interrogatory was handed to the foreman with the further comment by the judge, "You will have to sign this paper". The foreman and ten other jurors in turn walked to the table and signed the paper. One juror did not step up to sign and allegedly said to the judge, "I do not believe this is right. I cannot sign this paper". It is then alleged the judge said, "You are under oath to sign both these papers. You will have to sign this paper". When the juror asked to be excused the judge said, "I am not going to listen to this nonsense. This case has to be decided". The juror then signed the interrogatory.

We consider that the trial court's remarks if as alleged, as addressed to all of the jurors, were in the nature of instructing the jury to complete their work. The general verdict had already been shown to the court as signed by all of the jurors.

It is correct practice for the court, when the jury has failed to answer a certain interrogatory, to require them to return a proper special verdict. Consolidated Coal Co. v. Maehl, 130 Ill. 551, 558 (1889). Here, if the special verdict had not been signed, or even if signed, had been answered that plaintiff was not guilty of contributory negligence, it would not have affected the general verdict of not guilty. The general verdict could have been sustained on the basis of the defendants' freedom from negligence. The allegation of the particular statement to the one juror who allegedly did not wish to sign the special interrogatory (after she had previously signed the general verdict) was not prejudicial under the circumstances.



Plaintiff argues that the one juror in effect was indicating that she wished to repudiate her verdict. It is noted that the parties had waived the polling of the jury, but in any event we do not believe that the allegation presented a case of coercion of a verdict. A remark directed to the signing of a general verdict, "This case is costing the county a lot of money to try, and the attorneys have both worked very hard in this case. They deserve a verdict.", was held not coercive in Starac v. Corsale, 22 Ill. App. 2d 142 (1959) (Abstract Decision). Plaintiff's cite Crabtree v. Hagenbaugh, 23 Ill. 289 (1860) in this connection. But there the judge went into the jury room where the jury was deliberating to explain the meaning of the written instructions. The mere fact of the interview out of court properly caused the judgment to be reversed.

On the question of whether the court erred in excluding rebuttal testimony in a nature of the offer of proof of the testimony of Raymond Hills, the record supports the ruling of the trial court.

Plaintiff argues that whether the left turn signal and rear taillights of the truck were operating at the time of the collision was a crucial issue and rebuttal evidence bearing on this question should not have been limited. We do not believe that the record supports an argument that the rebuttal testimony was improperly limited. The plaintiff testified that he saw that the truck had lights in front by the reflection on the road and that he saw that there were reflectors and a fluorescent strip on the tailgate when he was some two blocks away, and that he had no difficulty in seeing the truck at that time. We note also that plaintiff did not testify that the taillights and rear turn signals on the truck

were not working at the time - his testimony was,

Q. Did you observe any lighted taillights
on the vehicle?

A. No.

Defendants placed testimony in evidence of a passenger in the defendant truck that he had observed the reflection of the rear taillights in the grille and bumper of the car behind them at one of the stops prior to the accident. Defendants called a witness Botts, who testified that he examined the truck after the accident at the request of a representative of the Telephone Company and that he found that the wires that controlled the rear lights and taillights were cut. Plaintiff was permitted to call witnesses in rebuttal who had repaired the truck to testify that the lights were working properly and that they did not do any work on the lights after the collision. Plaintiff was also permitted to call an expert from the Ford Motor Company to testify as to what would happen if the wires had been cut, to the effect that both rear lights would not go out but the left rear taillight and brake and turn signal would operate rapidly. Against this background the plaintiff called the witness Raymond Hills. Hills was the plant service foreman for the Telephone Company at Woodstock. He testified that at the time of the occurrence a Mr. Mansfield was the motor foreman at Woodstock and he was still with the Telephone Company. On objection, further testimony of Hills was refused and an offer of proof was made to the effect that supervision and maintenance of the vehicles was under Mansfield, and that the vehicle involved had been regularly assigned by one Harry Jackson whose duty it was to regularly check the vehicles for safety including lights; and that Jackson was still employed by Bell in Woodstock.



There is no showing in the offer of proof that the suggested witnesses could offer any relevant information on the question of whether the rear taillights and turn signals were operating at the time of the accident, or that their testimony would not merely be cumulative evidence of the condition of the lights.

Also, under these circumstances the refusal of the court to give I.P.I. Instruction 5.01, which in effect allows the jury to infer the testimony of a witness would be adverse if a reasonable person under the circumstances would have called the witness if he thought the testimony would have been favorable, was not error, particularly since there was no showing that the witnesses were not equally available to both parties, and extensive depositions had been taken. See Pawlowic v. Pearce, 59 Ill. App. 2d 153, 159 (1965); Petersen v. General Rug & Carpet Cleaners, Inc., 333 Ill. App. 47 (1947) and Santiemmo v. Days Transfer, Inc., 9 Ill. App. 2d 487 (1956), cited by plaintiff, involved cases where no evidence was presented on the issue. Here there was substantial and believable evidence as to the condition of the lights prior to the accident, reasonably excusing the defendant from the failure to call cumulative witnesses.

Error is asserted in the giving of defendants' instruction as to the duty to decrease speed "when approaching a hill-crest", pursuant to Ill. Rev. Stat. 1967, Chap. 95 $\frac{1}{2}$, Sec. 146. There was testimony by plaintiff that the scene of the accident was an "up grade" and a "long gradual incline". And plaintiff referred to "the crest" as did defendant Weaver, in description of the place of the accident. We are not persuaded by plaintiff's argument that, first, the statute is inapplicable because its obvious purpose is to protect the oncoming motorist and, second, that there was no "hill-crest". From the photographs and the testimony,

the presence of a hill-crest could be properly found. One driving on a hill may also presume that one to his rear will obey the statute requiring him to slow down when approaching a hill crest. Roberts v. Cipfl, 313 Ill. App. 373, 375 (1942); Dukeman v. C., C., C. & St. L. R. R. Co., 237 Ill. 104 (1908).

Plaintiff's claim of prejudicial error in the closing argument is directed at the comments of the attorney for the Telephone Company with reference to the sign which has been referred to as having the legend "Speed Zone Ahead" on its upper part and a separate sign below it on the same post reading, "40 MPH". Counsel asked the jury to study the signs. Plaintiff's counsel then objected,

Mr. HAYES: I object to that, as to what the significance of that sign is, whether it is a 40 miles per hour speed zone.

Mr. KISSEL: I think I can demonstrate it from the testimony very well.

THE COURT: We are not going to do that; we are not going to read the testimony back.

MR. KISSEL: No, I am not asking that. I would like to continue with the argument.

THE COURT: I will not let you continue in that field. I don't want the jury to get the impression that the speed limit is a settled proposition. That is, whatever the sign says, I don't question your right to argue it; you can argue it. (Emphasis added)

Counsel for defendant Bell then continued,

What does that mean, ladies and gentlemen? Speed zone ahead, 40 miles per hour. I suppose it could mean that up ahead there is a speed zone and right here is 40 miles per hour. Or it could be the other way, that up ahead is a speed zone that is 40 miles per hour.

There was no objection at this point and counsel proceeded to develop an argument that the distance between the sign and the place of the accident was about 1,056 feet, and that plaintiff was negligent in going 65 miles per hour "when he went by that sign and he at the very most slowed down 5 miles an hour or so". He then argued that plaintiff was "either in the speed zone or he was very close to it" when the impact took place. At this



point plaintiff's counsel objected that there was no evidence on that. The court then stated that "the sign speaks for itself. x x x Don't argue along the line what the man had to do at a certain point. That is for the jury to decide x x x Leave the sign out of it."

Counsel for the defendant Kelsey also argued the theory to the jury without objection that there was negligence in plaintiff's going 65 miles an hour, 200 feet from the crest of the grade, in front of commercial establishments and approaching the corporate limits after he passed a sign "go 40 miles per hour" without cutting his speed.

To the extent that counsel for the defendant was allowed to argue to the effect that the sign could be an indication of a 40 mile per hour speed limit at its location, there was error. The effect of a sign was a question of law. It is clear from the testimony of the witness for the State that if a sign indicated a speed zone ahead, the law required that 1000 feet ahead, a motorist must drive at a maximum speed of 40 miles per hour. The witness could not place the exact location of the sign on the county map with reference to the place of the accident.

However, the entire context of the arguments and of the court's rulings thereon made it clear that the question of whether the place of the accident was more than a 1000 feet from the warning sign so that the 40 miles per hour speed limit prevailed, or less than a 1000 feet so that the 65 miles per hour general speed limit was operative, was the question that the jury was to determine. This was properly a question of fact for the jury. The further argument that it was negligent not to slow down after passing the warning sign and in view of the terrain was also a permissible argument to the jury.

The court gave an instruction stating that the speed limit outside an urban district is 65 miles per hour, and on the total record we do not believe the jury could have been prejudiced by the court's initial error in permitting counsel to argue the effect of the warning sign.

We believe that no substantial or reversible error has been shown to upset a verdict which is not, and has not been argued to be, against the manifest weight of the evidence. There was no clear abuse of discretion by the trial court in denying the motion for a new trial. Loucks v. Pierce, supra, at page 261; Johnson v. Cunningham, 104 Ill. App. 2d 406, 412 (1969) and Jenkins v. Hechtman, 83 Ill. App. 2d 72, 78 (1967).

We affirm the trial court.

AFFIRMED.

MORAN, P.J. and DAVIS, J. concur.

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No. 68-27

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

LARRY ALLAN SLIGHTOM, a Minor, etc.,)

Plaintiff,)

-vs-)

ASHMORE GRAIN COMPANY, EDSEL HIGGINS,)

BEULAH GREJTAK, Administratrix of the)

Estate of Donald L. Duvall, Deceased,)

U-HAUL COMPANY, WILLIAM GREEN and)

ARCOA COMPANY,)

Defendants.)

BEULAH GREJTAK, Administratrix of the)

Estate of Donald L. Duvall, Deceased,)

Counter-Plaintiff-Appellant,)

-vs-)

ASHMORE GRAIN COMPANY and EDSEL)

HIGGINS,)

Counter-Defendants-Appellees.)

Appeal from Circuit Court (Third)
Madison County, Illinois.

Honorable Austin Lewis,
Trial Judge Presiding.

George J. Moran, J.

Counter-plaintiff, Beulah Grejtak, Administratrix of the Estate of Donald Duvall, appeals from a judgment denying recovery for wrongful death.

The evidence shows that on September 8, 1964, at about 5:45 a.m., Donald Duvall was driving his Ford Mustang, which was towing a rented U-Haul trailer loaded with household goods and equipment owned by Duvall. Riding with Duvall was the plaintiff, Larry Slightom. The trailer hitch was built to carry a maximum load of two thousand pounds, and the weight of the trailer and the contents was over six thousand pounds. The U-Haul dealer gave Duvall instructions on the use and capacity of the trailer in the form of a booklet described as a "Trailer Users Guide", which stated that a large trailer should never be towed by a small car.

As Duvall was driving his combination car and trailer along Interstate Highway 70 near Collinsville, Illinois, he lost control of the car as he was



approaching a viaduct or small highway bridge. The combination Mustang and trailer moved from the right lane to the left lane where some part of this combination struck either the curb or the bridge abutment and as a result, this combination was strung across the highway so that the trailer was blocking the left lane and the Mustang blocked the right lane. The U-Haul trailer was then struck by a tractor-trailer owned by Ashmore Grain Company and driven by Edsel Higgins. Either hitting the bridge abutment or being hit by the tractor-trailer driven by Higgins, caused the Mustang to flip over and catch fire. Duvall sustained burns of such severity that he died. Slightom was also subjected to severe burns, but he survived; although he lost one arm and was permanently disabled and disfigured.

Slightom filed a complaint naming Higgins, Ashmore Grain, and Duvall's Administratrix as defendants, alleging that Higgins so negligently operated the tractor-trailer under his control that it ran into the Mustang and trailer, and that Duvall was guilty of wilful and wanton misconduct in not keeping the Mustang and trailer under control. Duvall's administratrix filed a counterclaim against Ashmore and Higgins for her intestate's wrongful death.

Slightom filed additional counts naming U-Haul Co., William Green and Arcoa, Inc., as additional defendants. U-Haul was the trailer supply company which rented Duvall the trailer; Arcoa was its holding or managing company, and Green its agent. The additional counts charged these defendants with negligence in renting Duvall a defective trailer, and in failing to give him warning of its condition and tendencies. Duvall's administratrix did not counter-claim so as to include U-Haul, Arco and Green.

During the trial, all defendants moved for directed verdicts against Slightom, but all motions, except that of Duvall's estate which was granted, were denied. At the conclusion of the trial, the jury returned verdicts: In favor of Slightom and against U-Haul, Arcoa and Green for \$260,000; in favor of Ashmore and Higgins and against Slightom; and in favor of Ashmore and Higgins and against Duvall's estate. Duvall's estate appeals.



Slightom testified that as the car and trailer were traveling down the highway, the rear of the car started to bounce up and down. Duvall applied the brakes which made the car and trailer veer to the left and slide. The car then halted for a split second and then there was a flash of light and a crash and the car turned over and burst into flames. Slightom stated that he did not actually see any car or truck come into contact with either the Mustang or U-Haul, but that he was sure that the Mustang did not turn over when the U-Haul hit the curbing or the bridge, and that he was sure that the Mustang was upright before the crash and flash of lights.

Higgins, the driver of the tractor-trailer owned by Ashmore, testified that he had been behind the car-trailer combination for about a quarter of a mile in the right lane when he noticed the U-Haul began whiplashing; that it kept up with whiplashing for two hundred or three hundred feet and then moved over into the left lane and out of his view; that the car-trailer combination went out of his view because there was another tractor-trailer passing him on his left; that the other tractor-trailer was between him and the U-Haul and obscured it; that he was within seventy-five to one hundred feet of the car-trailer combination when it disappeared from his view; that after the combination went out of his view, the tractor-trailer on his left began to slow down, whereupon he released the accelerator but did not apply his brake; that the car-trailer combination reappeared, and the Mustang was coming around in a cross-wise position with headlights coming around facing him; that he could see that the Mustang had already turned over and hit the highway on its top and burst into flames; that when the Mustang reappeared, the trailer had already become detached and had landed on its top in the left lane; that the tractor-trailer on his left came to a complete stop some twenty-five to thirty feet from the burning Mustang, whereupon he applied his brake and drove his tractor-trailer to the left, between the burning Mustang in the right lane and the stopped tractor-trailer in the left lane; that as he proceeded in the left lane he collided with the detached U-Haul trailer and came to a stop in the right lane; that he could tell that the car and U-Haul were unattached because the back end of the car was up



against the right lane catwalk of the bridge and no trailer was behind it; and that he intentionally drove into the U-Haul so as to avoid the burning Mustang.

Another witness, who was a professional engineer specializing in the reconstruction of accidents, testified that he had reconstructed the accident from pictures taken of the Mustang and U-Haul trailer at the scene of the accident; that in his opinion, the U-Haul became detached from the Mustang when the trailer hit the curbing; that when they became detached, the Mustang's left wheels hit the curb, and the Mustang became airborne and flipped over and landed on its top; that the U-Haul itself did not provide the energy to flip the Mustang; that the separation of the U-Haul and the Mustang caused the gas tank to rupture; and therefore, in his opinion, the U-Haul and Mustang were not connected when Higgins hit the U-Haul trailer.

Appellant contends that (1) the evidence against Ashmore Grain Company, operator of the tractor-trailer involved, and Edsel Higgins, its driver, was so conclusive that this court should enter a judgment of liability in favor of the appellant and remand this case to the trial court for the sole purpose of fixing damages, or that (2) the evidence against Ashmore and Higgins was so overwhelming that the verdict in their favor should be set aside and a new trial awarded.

Appellees contend (1) that the question of contributory negligence of the deceased, Donald Duvall, and the negligence of Ashmore Grain Company and Edsel Higgins, were questions of fact properly presented to the jury and the jury verdicts and judgments entered thereon in favor of Ashmore Grain Company and Edsel Higgins should be affirmed, and (2) that appellant's contention that Higgins' conduct was negligent as a matter of law, prior to striking the U-Haul trailer, is immaterial because a question of fact was presented as to whether or not the Mustang was already on fire and disconnected from the U-Haul trailer at the time of the collision.

In *Pedrick v. Peoria and Eastern Railroad Company*, 37 Ill 2d 494, 510, 229 NE2d 504 (1967), our Supreme Court held that verdicts ought to be directed and judgments notwithstanding the verdict entered only in those cases in which all the evidence, when viewed in its aspect most favorable to the opponent, so



overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.

As this court stated in *Brayfield v. Johnson*, 62 Ill App 2d 59, 210 NE2d 28, and *Frozen Food Express v. Modern Truck Lines, Inc.*, 79 Ill App 2d 84, 223 NE2d 275, and again in *Cochran v. Parker*, 91 Ill App 2d 56, 233 NE2d 443:

"A court of review can set aside a verdict as being against the manifest weight of the evidence only when it is obvious or clearly evident that the jurors have arrived at an incorrect result. *Romines v. Illinois Motor Freight, Inc.*, 21 Ill App 2d 380, 158 NE2d 97 (1959). It is for the jury alone to determine the credibility of witnesses and the weight of the evidence on controverted questions of fact. A verdict based on conflicting evidence and approved by the trial judge should not be disturbed on appeal unless contrary to the manifest weight of the evidence; that is, an opposite conclusion must be clearly evident. *Ritter v. Hatteberg*, 14 Ill App 2d 548, 145 NE2d 119, (1957). Manifest means clearly evident, clear, plain, indisputable. *Schneiderman v. Interstate Transit Lines, Inc.*, 331 Ill App 143, 72 NE2d 705 (1947)."

Assuming without deciding that Higgins was guilty of negligence in driving the Ashmore truck into the U-Haul trailer, the jury could still have found that the U-Haul trailer and the Mustang driven by Duvall were disconnected prior to the collision and that, therefore, although the Ashmore truck struck the U-Haul trailer, it never made contact with the Mustang. The jury could also have found that Duvall was guilty of contributory negligence under all of the circumstances of the accident.

For the foregoing reason, the judgment of the Circuit Court of Madison County is affirmed.

Judgment Affirmed.

CONCUR

Honorable Joseph H. Goldenhersh

Honorable Edward C. Eberspacher

PUBLISH ABSTRACT ONLY.

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NO. 69-56

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the
	)	Circuit Court of
vs.	)	St. Clair County.
)	
DELANO BELL,	)	Honorable Harold O.
	)	Farmer, Judge Presiding.
Defendant-Appellant.)	

Goldenhersh, P. J.

Defendant, Delano T. Bell, was tried by jury in the Circuit Court of St. Clair County and convicted of the crime of Burglary (Ch. 38, sec. 19-1, Ill. Rev. Stat. 1967). The court denied defendant's post-trial motion, heard evidence in aggravation and mitigation, and sentenced defendant to the Illinois State Penitentiary for not less than 8 nor more than 20 years.

George Maksudian testified he was the owner of a dry cleaning establishment in East St. Louis, known as Eagle Cleaners. At approximately 11:30 P. M. on December 16, 1967, he received a call from A. D. T., and upon arrival at his place of business, discovered two windows were broken. He had closed the building at 6:00 P. M., at which time all the doors and windows were locked and none were broken.

Fred Meyer testified he was a policeman in the City of East St. Louis. In response to a call that an alarm was sounding at Maksudian's premises, he and Detective Russell drove there. Russell went to the front of the building, Meyer started toward the rear. There are windows on the side of the building and he saw defendant inside.

He "hollered" for him to halt, got no response, so he broke out a window with his pistol. He called out "Delano, come on out and lay down". The A. D. T. man arrived, opened the building, and handcuffed the defendant. Defendant was advised of his rights and answered "I don't care - I was in here to get my clothes".

Officer Charles S. Russell corroborated Officer Meyer's testimony as to their arrival at the premises, and defendant's arrest.

William Henry Straum, employed by American District Telegraph (A. D. T.), testified an alarm was received from Eagle's premises. Except for receipt of the alarm and his travel to the premises, his testimony is substantially the same as that of Meyer and Russell.

Maxine Yarborough testified defendant had been at her home for several hours that evening, and had consumed substantial amounts of gin and beer.

Defendant testified he had taken some clothing to Eagle Cleaners, and was not given any claim checks. When he returned to pick them up he was told they were not ready, but would be ready the next day. When he returned he was told they knew nothing about them. He went back again and had an argument with someone in charge. On December 16th, he had been drinking, and at his girl friend's home he drank some more. He remembers leaving her home, and the next thing he remembers is being arrested.

Mr. Maksudian testified there were no clothes registered in defendant's name at the time.

As grounds for reversal, defendant contends the evidence fails to prove the specific intent required in the crime of burglary, and the evidence shows that defendant, by reason of intoxication was



unable to form that intent.

The circumstances of defendant's being apprehended in the premises at 11:30 P. M. on a Saturday night, having gained entry through a broken window is sufficient to sustain the conviction. The People v. Brown, 27 Ill. 2d 23.

Lack of intent by reason of intoxication is an affirmative defense (Ch. 38, secs. 6-3, 6-4, Ill. Rev. Stat. 1967) and the defendant having raised the issue of lack of intent, the People must prove the defendant guilty beyond a reasonable doubt as to that issue together with all the other elements of the offense. (Ch. 38, sec. 3-2, Ill. Rev. Stat. 1967).

Both police officers testified defendant was not intoxicated at the time of the arrest. This issue, along with the others were for the jury, and the evidence is sufficient to sustain the conviction.

Defendant contends the sentence is grossly excessive. We have examined the record and are unable to say that it is so excessive as to require reduction by this court.

For the reasons set forth the judgment of the Circuit Court of St. Clair County is affirmed.

Judgment Affirmed.

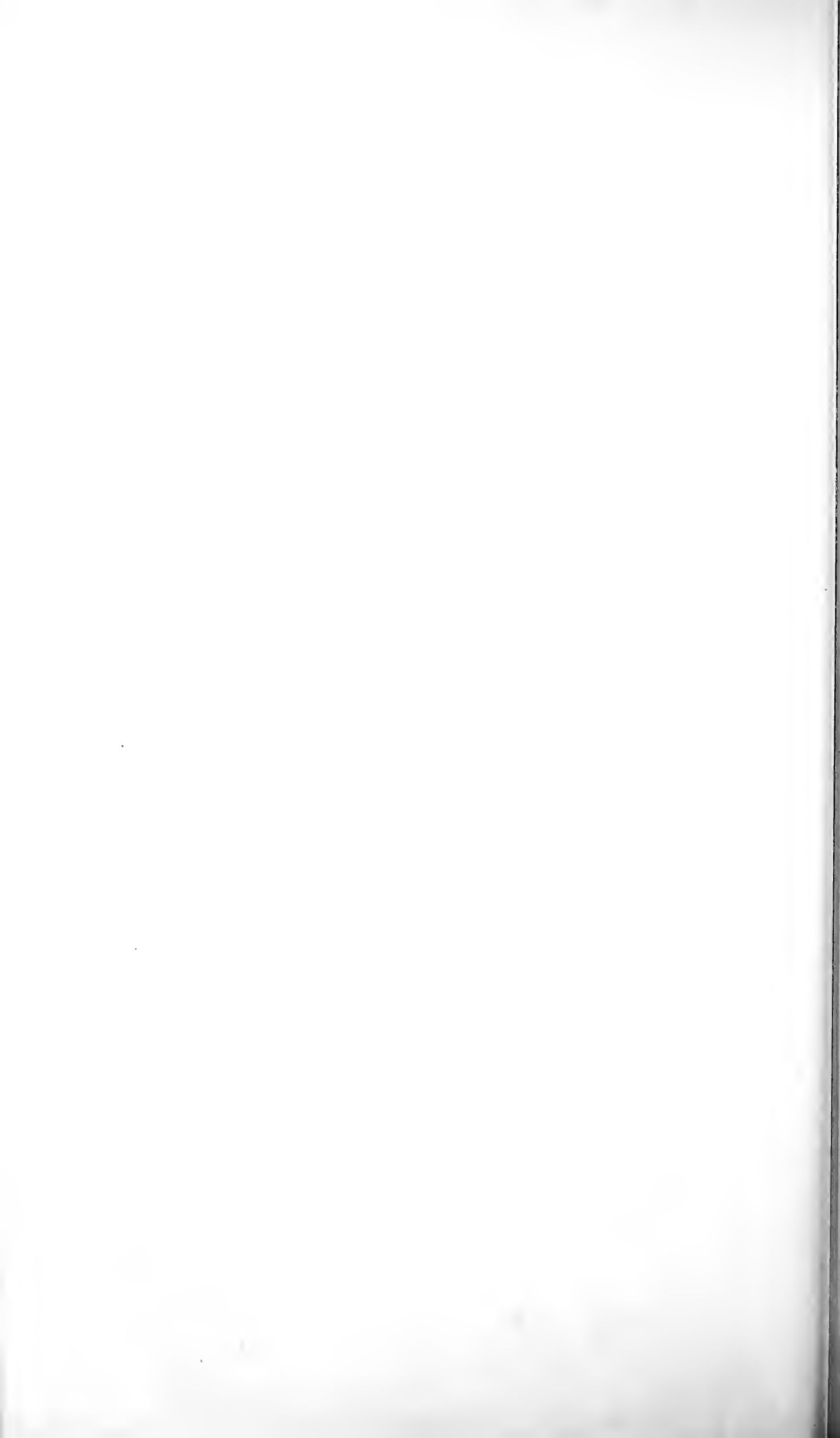
Concur: George J. Moran

Concur: Edward C. Eberspacher

PUBLISH ABSTRACT ONLY

FILED
OCT 27 1969

Walter S. Simmons
Fifth District of Illinois
CLERK OF COURT



IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

Abstract

FILED

OCT 28 1969

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

WOOLBRIGHT, INC., a
Corporation,

Plaintiff-Appellee,

vs.

EDWIN H. SARVER,

Defendant-Appellant.

Appeal from the Circuit
Court of the Fifteenth
Judicial Circuit, Ogle
County, Illinois.

MR. JUSTICE SEIDENFELD DELIVERED THE OPINION OF THE COURT:

This case comes to us on appeal from a decree entered by the trial court finding that defendant, Edwin Sarver, had fraudulently induced plaintiff, the Woolbright Corporation, to convey property to Sarver, and ordering that the deed dated October 13, 1964 be declared null and void and that the plaintiff recover the property.

In late August of 1964 the Woolbrights personally owed Edwin Sarver approximately \$60,000. On August 27, 1964 the Woolbrights conveyed two apartment buildings to Sarver on which Sarver held a \$40,000 mortgage. On September 5, 1964 Sarver gave a check for \$3,496.67 to the Woolbrights which "rounded out" the total amount of the debt to an even \$64,000. (A contract was made which would have allowed the Woolbrights to repurchase the apartments for \$64,000, but it was never executed.)

The Woolbrights claim that the conveyance of the apartments was in satisfaction of the entire debt. They received cancelled



notes in the amount of \$51,000 and claim that another \$13,000 note, which was not returned to them until December of 1964, was also cancelled at that time.

Sarver claims the apartments were only worth \$40,000, and although he admits cancelling \$51,000 of notes he contends the apartments were all he could get from the Woolbrights, as financing he claims the Woolbrights were going to obtain to pay him off did not materialize. Sarver further claims that the \$64,000 price on the repurchase agreement reflected the debt owed to him and not the value of the apartments, and that the \$13,000 note was not cancelled in the apartment transaction but was given up in December as part of the consideration for the conveyance of five Hillcrest lots with houses on them which were deeded to Sarver, subject to a \$30,000 mortgage, from the Woolbright Corporation on October 13, 1964.

It is this October transaction which is the subject of this law suit. Plaintiff Woolbright Corporation contends defendant Sarver fraudulently offered to obtain a \$50,000 loan for the benefit of the plaintiff, and in order to facilitate the loan, plaintiff, relying on the promise, deeded the Hillcrest property to defendant. Sarver claims the transfer was in satisfaction of debts owed to the defendant by the Woolbrights as well as the assumption of the existing mortgage on the property which defendant subsequently paid off.

A major part of the testimony at the trial revolves around the events which transpired on the day of this conveyance.

Dallas, Flaudia, and Carlos Woolbright, the managing officers and controlling shareholders of the closely held Woolbright Corporation, testified that on that day, October 13, 1964, a discussion was held in the office of Philip Nye, attorney for

Edwin Sarver, in the presence of both Nye and Sarver, during which it was agreed that the Woolbright Corporation would transfer the property in question to Edwin Sarver and that Sarver would obtain a \$50,000 loan for the Woolbright Corp. It is admitted that Attorney Nye drew the papers for the transfer of the property as well as the appropriate corporate resolution required for such a corporate transfer. The Woolbrights further testified that at that time it was discussed and agreed in Attorney Nye's presence that Nye would hold the deed in escrow until the loan was received by the Woolbrights.

It is admitted that Sarver took the deed with him that day, and that no loan was ever obtained for the Woolbrights.

In her pretrial deposition and affidavit, Flaudia Woolbright indicated that the consideration for the conveyance of the property described as the five Hillcrest lots with houses, in addition to the money owed, was the assumption by Edwin Sarver of the existing mortgage on the properties conveyed and the assumption by Mr. Sarver of other bills pertaining to the apartments and houses so conveyed. In her testimony during the trial, Mrs. Woolbright stated that she was confused by the question which induced that answer, and that in fact her answer in the deposition and affidavit referred to another subject, presumably the apartment house transaction.

Sarver denied the existence of any agreements as to a loan or an escrow, but rather testified that the transfer was an arms-length transaction intended to convey the property to him in satisfaction of a debt he said the plaintiff or its principal officers owed to him, with the further understanding that Sarver would assume and satisfy the existing \$30,000 mortgage on the property.

Attorney Nye testified that there was no discussion in his presence concerning any loan or escrow agreement, but rather that he understood the conveyance to be an unconditional transfer to Sarver in satisfaction of a substantial debt owed by the Woolbrights to Sarver.

Vernon Smith, President of the National Bank of Rochelle, testified that Sarver had discussed borrowing \$50,000 from the Rochelle Bank on property Sarver told him he had purchased from the Woolbrights. Smith testified this conversation probably took place around the first of November 1964, but that he knew none of the details of the Woolbright-Sarver transaction.

Roger Gillespie, Vice-President of the Holcomb State Bank, which held the \$30,000 mortgage on the property involved, testified he collected payments on the mortgage interest from Mrs. Woolbright for a period of time from January 1965 until October 1965 and that these payments were rent and contract payments from the occupants of the houses on the property conveyed. These collections stopped in October of 1965 when Sarver paid off the mortgage. The note itself, Gillespie testified, was due in October of 1964 but was not foreclosed at the request of Sarver.

The Woolbrights denied knowing Sarver left with the deed on October 13, 1964, and it is disputed as to just what communications took place between the parties thereafter. The Woolbrights claimed that numerous requests were made for the loan. Sarver and Nye each testified that nothing was mentioned to them concerning the loan or the deed.

On September 10, 1965 Sarver recorded the deed, and in late 1965, December according to Sarver, the Woolbrights sold another piece of property to Sarver.

The Woolbrights, Sarver, and Nye all agreed that the meeting for this transaction was friendly and that no mention was made concerning the loan at that time.

The record in this case contains numerous discrepancies and direct contradictions, and in a case such as this where the evidence is primarily testimony of the parties with little independent material evidence, we are aware of the reliance we must place on the opinion of the trial court who was able to judge the credibility of the witnesses at firsthand. However, we must indulge that reliance in light of the burden of the plaintiff to demonstrate fraud by clear and convincing evidence in order to overcome the presumption of validity of a deed which has admittedly been executed and acknowledged by the plaintiff, and being of record, presumed to have been delivered. Mills v. Ehler, 407 Ill. 602, 612 (1951); Finney v. White, 389 Ill. 374, 378 (1945).

We believe the trial court's decision that plaintiff satisfied his burden of proof is against the manifest weight of the evidence. The testimony of Vernon Smith or Richard Gillespie cannot be said to corroborate the plaintiff's theory as to what took place at the time of the execution of the deed anymore than it corroborates defendant's theory, and we believe the rationale of cases, which hold that more than the unsupported testimony of the grantor is required to overcome the certificate of acknowledgment to a deed, is applicable here where the grantors are the Woolbrights operating through the Woolbright corporate entity. Bernstein v. Bernstein, 398 Ill. 52, 54 (1947); Jaworski v. Sujewicz, 334 Ill. 19, 22 (1929).

While it was within the trial court's discretion to accept Mrs. Woolbright's explanation concerning her seemingly contradictory testimony, we do not believe the trial court could disregard the unimpeached, uncontradicted testimony of Attorney Nye

which we see as being in direct conflict with the testimony of the Woolbrights. Urban v. Industrial Commission, 34 Ill. 2d 159, 163 (1966); Dill v. Widman, 413 Ill. 448, 454 (1953). (We note that plaintiff concedes: "Mr. Nye is not being charged with perjury, breach of fiduciary duty or conspiracy, and the defendant is certainly not justified in making the assertion that the chancellor so concluded. There is no basis anywhere in the record for this assertion.") Since this testimony was required to be considered with all the other evidence, we feel plaintiff has failed to sustain its burden of proof.

Defendant-appellant Sarver's motion to amend his pleadings to conform his answer and affirmative defense with his proofs on the issue of laches has been taken with the case. The application is controlled by Supreme Court Rule 362 (S.H.A., Ch. 110A, Sec. 362) and such an application is within the discretion of the court. (Salitan v. Neff Feed Co., 351 Ill. App. 127 (1953)). Sec. 362(b) requires the moving party to show that no prejudice will result to the adverse party if the amendment sought is permitted. The court feels that the plaintiff-appellee was not sufficiently advised as to the laches issue and was, therefore, not allowed adequate opportunity to contest the defense. Since we feel the plaintiff-appellee would be prejudiced thereby, we deny the application. (Salitan v. Neff Feed Co., supra)

The decree of the circuit court is, therefore, reversed and the cause remanded, with directions to dismiss the complaint for want of equity.

Reversed and Remanded with Directions.

MORAN, P.J. and DAVIS, J. concur.

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PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM
Plaintiff-Appellee,)	
vs.)	CIRCUIT COURT,
	COOK COUNTY.
HORACE NIX,)	
Defendant-Appellant.)	HON. JAMES J. MEJDA, Presiding.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty by a jury of the crime of armed robbery and was sentenced to a term of 12 years to 25 years in the penitentiary. He appeals.

On March 18, 1962 defendant entered a grocery store located on West 71st Street in Chicago and took \$66 from Mrs. Helen Walters at gunpoint. The store was owned by Mrs. Walters and her husband, Mr. George Walters, who was also present during the robbery.

Chicago Police Officers Malachi Baker and Joseph Branch arrived at the store while the robbery was in progress. As Officer Baker entered the store, defendant brandished his pistol and then concealed it and ran to the rear of the store. Officer Baker fired a shot over defendant's head and defendant ran into a back room which turned out to be a washroom and which had no exit other than the one defendant entered. The officer fired three more shots and defendant surrendered, leaving his pistol in the washroom.

Defendant was taken to police headquarters after his arrest where he gave an oral statement in the presence of Officers Baker and Branch and the Walters. Defendant was asked to sign the statement which had been reduced to writing, but he refused.

On March 21, 1962 defendant was admitted to the Cermak Memorial Hospital under an admitting diagnosis of bronchial asthma and epilepsy. After sixteen days of tests and observation, he was discharged from the hospital with a diagnosis of undifferentiated schizophrenic reaction.

Dr. William Haines, a psychiatrist, examined defendant on

April 16, 1962 and again the following day, and concluded that he was not competent to stand trial for the reason that he was unable to cooperate with counsel. After a sanity hearing defendant was adjudged insane and was committed to the Illinois Security Hospital. He was subsequently returned from the hospital to stand trial. On March 21, 1963 a hearing was held on a motion to suppress the oral statement given by the defendant on the day of his arrest. The motion to suppress the statement was denied.

Trial of defendant was commenced on April 25, 1966. The defense raised was insanity at the time of the robbery.

Mrs. Helen Walters testified that defendant entered the store on the day in question and asked to purchase a pie. When Mrs. Walters opened the cash register to give defendant change for a dollar bill, defendant drew a pistol and demanded all the money in the register. Mrs. Walters gave defendant "30 or 36 singles" from the register, and when defendant observed only singles being given to him he demanded "the rest of the money." Mrs. Walters went to another part of the store, procured another \$30 and gave it to defendant.

At this point, Mrs. Walters testified, the police arrived. Defendant pointed his pistol at the police, attempted to hide it, and again pointed the weapon at the police. Mr. Walters, who was also in the store at the time, then shoved the defendant; the defendant swung at him with the gun hand but missed, and then proceeded to the back of the store. He entered the washroom, the police fired shots and defendant surrendered without his pistol.

Mrs. Walters testified that she was of the opinion that defendant was sane at the time of the robbery because defendant immediately noticed that she first gave him only singles from the cash register, and further because of the speed with which he determined to escape arrest. On cross-examination Mrs. Walters testified that she had no formal training in the field of mental disorders.

Mr. Walters' testimony substantially corroborated that given by

Mrs. Walters. He observed nothing unusual about the demeanor of the defendant during the robbery. Mr. Walters stated that, based upon his business and personal contacts with people in the past, he was of the opinion that defendant was sane at the time of the robbery. On cross-examination Mr. Walters stated that he also had no formal training in the field of mental disorders.

Officer Baker testified that he and his partner, Officer Branch, responded to a radio call regarding a disturbance in the vicinity of the Walters' store. Upon arrival at the scene, a bystander directed the officers' attention to the Walters' store. While Officer Branch spoke to the bystander, Officer Baker approached the store, looked in and observed defendant with a pistol. The officer called to the defendant as he pushed the door open and when defendant saw the officer he turned and ran toward the rear of the store and disappeared from sight into a back room. The officer called to the defendant to come out and when he received no response, the officer fired several more shots in the direction of the defendant. Defendant thereafter surrendered without his weapon. A search of the washroom revealed the defendant's pistol lying behind the toilet bowl.

The officer testified that, based upon his experience with people as a police officer and as a private citizen, he was of the opinion that the defendant was normal and sane at the time of the robbery. The officer stated that defendant's actions were normal, that defendant's attitude appeared to have been one of despondence over what he had done, and that defendant, in detail, rationally described in his oral statement at police headquarters all that transpired after he entered the Walters' store.

Officer Branch testified that as Officer Baker went to the store on the officers' arrival at the scene, Officer Branch spoke to the bystander who directed their attention to the store. After hearing shots from the store, the witness radioed for additional help and then joined Officer Baker in the store. Defendant surrendered

shortly thereafter. The officer testified, that based upon his past observations of mentally deranged persons and further based upon his observations of defendant on the date of the robbery and the conversations he overheard between the defendant and other police officers after the robbery, he was of the opinion that the defendant was sane at the time of the robbery. The officer also based his opinion on the fact that the defendant answered questions propounded to him at police headquarters after his arrest without hesitancy and the fact that he refused to sign the statement after it was reduced to writing. The officer further testified that he recalled that defendant was asked why he committed the robbery, to which the defendant replied that "he owed a lawyer some money and that he took the money to pay the lawyer."

Dr. David Lemberg testified for the defense and stated that he interviewed the defendant in February 1966. He examined the electroencephalogram which was taken 75 days after defendant's arrest, the results of which he interpreted as depicting a type of epilepsy that is manifested by an uncontrollable behavior to the extent that the person suffering from the condition is not aware of his behavior; he stated that there is also a general amnesia connected with the particular condition. The doctor was of the opinion that defendant suffered from psychomotor epilepsy which preexisted the date of the robbery. He was of the further opinion that defendant could have lacked the capacity to appreciate the criminality of his actions on that date or to conform his conduct to the requirements of the law. He also stated that a person suffering from such condition can perpetrate an armed robbery during a seizure of that nature.

Doctor Lemberg also testified that a person suffering from the condition described will not lend himself to be subdued during the period of the seizure, that his behavior would have the appearance of definite irrationality, that such a person will have lucid intervals, and that there is a possibility that a person who evidenced

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a "no recall" situation could be feigning the condition to escape the consequences of his acts.

Dr. Donald Beacock testified that he was a psychiatrist for the Cermak Memorial Hospital and that he examined defendant in March 1962. Defendant's mental disorder was diagnosed as schizophrenic reaction, which was a psychosis. The doctor further testified that he familiarized himself with all the medical and sociological data concerning defendant which was stipulated into evidence, as did both Dr. Lemberg and Dr. Haines, and stated that the additional information concerning the defendant confirmed his original opinion of March 1962. Dr. Beacock testified, based upon a hypothetical question, that defendant, on the date of the robbery, could have lacked the capacity to appreciate the criminality of his actions or to conform his conduct to the requirements of the law. The doctor further testified that he interviewed defendant at three separate fifteen-to-twenty minute sessions, and at no time did he appear to be malingering.

Dr. Haines testified in rebuttal that he examined defendant on numerous occasions since April 1962, that defendant at that time was suffering from a mental disorder, and that due to subsequent observations and electro-encephalograms, he determined that defendant was not suffering from psychomotor epilepsy. The doctor further testified that, at the time of the robbery, defendant had the capacity to conform his conduct to the requirements of the law, that defendant was, at times, malingering or "faking the symptoms," and that defendant was not suffering from schizophrenic reaction at the time of the robbery.

Defendant first contends that the People failed to prove his sanity beyond all reasonable doubt.

~~The~~ The ordinary presumption of sanity of an accused is overcome by evidence tending to show that he was insane at the time of the commission of the crime. The prosecution is then required to prove, as

an essential element of its case and beyond all reasonable doubt, that the accused was legally sane at the time of the commission of the crime. People v. LeMay, 35 Ill. 2d 208, 211; People v. Givans, 83 Ill. App. 2d 423, 429. Three medical experts testified as to defendant's mental condition at the time of the robbery, and four laymen gave their accounts of defendant's actions and behavior at that time. In the state of the present record, the question of defendant's sanity was a matter for the trier of fact to determine. People v. LeMay, 35 Ill. 2d 208, 211.

~~2-15~~ We are of the opinion that there was ample evidence adduced at the trial from which the jury could find that defendant, at the time of the robbery, was sane beyond all reasonable doubt. Although Dr. Haines testified that defendant was suffering from a mental disorder at the time of the robbery, he unequivocally testified that the defendant was able to conform his conduct to the requirements of the law at the time. The doctor further testified that, at least part of the time after the robbery, defendant had been malingering and was "faking the symptoms." The four lay witnesses who testified were in accord that defendant appeared sane at the time of the robbery and that he acted in a normal manner at the time. It is well settled that where competent evidence supports the determination of the jury on a question of fact, that determination will not be upset on appeal.

Defendant directs our attention to certain allegedly prejudicial conduct of the prosecuting attorney during trial, and contends that this conduct precluded defendant from receiving a fair trial.

Defendant maintains that he was prejudiced first by the entry into evidence of nine exhibits from the Illinois Security Hospital which informed the jury of his past criminal record and also of criminal charges then pending against him. Although defendant initially objected to the admission of these documents into evidence, the objection was later withdrawn and both sides stipulated that the evidence could be received "for whatever purpose either side

wants to make of them," with an exception not relevant here. It appears nowhere in the record that the jury ever saw the documents complained of, or that they were ever informed of the existence thereof.

Defendant also argues that the prosecuting attorney, in his closing argument, improperly stated that defense counsel was being dishonest in that he accused defense counsel of clouding the issues in the case by manufacturing the defense of insanity. It should be noted at the outset that no objections were raised at the time the statements alluded to were made.

~~25~~ As appears from the context of the argument in which the statements were made, the prosecuting attorney was stating that, having been caught in the act of the robbery, defendant's only escape from the consequences thereof was to manufacture the insanity. The argument is entirely consistent with Dr. Haines' testimony that defendant was, at times, malingering and was "faking the symptoms." Statements by the prosecutor based upon the evidence and the fair inferences drawn therefrom do not exceed the bounds of proper argument. *People v. Ostrand*, 35 Ill. 2d 520, 531-532.

Furthermore, from the context of the argument, the alleged manufacture of the defense of insanity was attributed to the defendant himself, and not to his counsel. The prosecuting attorney did not engage in a general tirade against the defense attorney, as was the situation in *People v. Polenik*, 407 Ill. 337, cited by defendant.

Defendant's third ground for claiming he was denied a fair trial is that the prosecuting attorney allegedly confused the jury by means of a faulty hypothetical question during the examination of Dr. Haines, by making reference to defendant personally as well as to a hypothetical person, and also by including in the hypothetical question matters taken from defendant's oral statement made the day of the robbery concerning such facts as his marital status, his age, and the like.

~~2/2~~ After defense objections were sustained to the phrasing of the hypothetical question, the prosecuting attorney corrected the question, and the doctor stated he understood the question and then answered it. As to the alleged improper incorporation into the hypothetical question of the matters taken from defendant's oral statement, it need only be said that this issue was waived when defendant included the same information into a hypothetical question propounded Dr. Beacock a short while after Dr. Haines testified.

~~2/2~~ Defendant finally contends that the sentence imposed was excessive and that it was also the result of prejudicial matters brought out during the hearing in aggravation and mitigation. The matters referred to by defendant as having been prejudicial are the accounts given at the hearing by two persons who were victims of crimes committed by the defendant shortly before the robbery in question, the charges for which were then pending against him. Such matters should not have been gone into at the hearing. However, the record does not indicate that the trial court was in any way influenced by these matters in arriving at the sentence. People v. Bradford, 23 Ill. 2d 30.

On the contrary, as appears from the record, the main concern of the trial court was that a sentence be imposed "to fit the particular crime as well as the conditions under which they [sic] were performed and also to be able to help yourself and improve yourself so that you are able to return back to society." The court was well aware of defendant's behavioral instability over the years and was concerned with imposing a sentence that defendant could receive "whatever medical care that is recommended in our institutions." The court thereupon recommended a program of mental rehabilitation for the defendant.

It is apparent that the primary purpose of defendant's incarceration was to allow him the opportunity for institutional care

and rehabilitation. All of the expert witnesses were in agreement that defendant was in need of some form of mental correctional treatment, and we are of the opinion that the trial court was in the best position to determine the length of time necessary for his rehabilitation. People v. Taylor, 33 Ill. 2d 417. The sentence imposed was not excessive.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and McCORMICK, J., concur.

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PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Appellee,)	
)	Appeal from the Circuit
v.)	
)	Court of Cook County.
LAWRENCE McCORD,)	
)	
Appellant.	)	James A. Geroulis, J.

MR. PRESIDING JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

The defendant was charged in two indictments with possession of a narcotic drug, and armed robbery and attempt murder. He pleaded guilty to both indictments and was sentenced to three to six years in the penitentiary.

The defendant was indigent and the Public Defender was appointed to represent him both in the trial court and on appeal. A petition for leave to withdraw as appellant counsel has been filed on the ground that an appeal could not possibly be successful. Pursuant to Anders v. California, 386 U.S. 738 (1967), the Public Defender also filed a brief raising the one issue which he thought might conceivably support an appeal: that the trial court did not fully admonish the defendant as to the consequences of changing his plea from not guilty to guilty. This court notified the defendant of the motion and afforded him the opportunity to file any points he might choose to support his appeal. No response has been received.

From the issue raised by the Public Defender and our own examination of the proceedings, we find nothing arguable on the merits and conclude that an appeal would be wholly frivolous.

At his arraignment the defendant pleaded not guilty to both indictments. He subsequently withdrew the plea, and pleaded guilty to all of the charges.

The Public Defender's brief covers the possible issue of whether the trial court properly accepted the defendant's plea of guilty. A plea may be accepted in open court when the court finds that the defendant understands the nature of the charges against him and the consequences of his plea, and, understanding this, pleads guilty. Supreme Court Rule 401(b)(Ill.Rev.Stat., ch. 100A, sec. 401(b)(1967)). The defendant had the assistance of the Public Defender when he entered his plea of guilty. His counsel stated that he and the defendant had had several discussions as to the possible results of a plea of guilty and that a decision had been made to plead guilty. The court asked the defendant if this was correct and upon receiving an affirmative response informed him of his right to a jury trial, the minimum and maximum sentences for each offense and the consequences that could follow a guilty plea. The defendant persisted in his plea of guilty after this admonishment and the plea was accepted. The court fully and completely warned the defendant (People v. Outten, 22 Ill.2d 146, 174 N.E.2d 685 (1961)) and the acceptance of his plea was proper. It cannot be reasonably contended that he did not understand his rights, the nature of the crimes with which he was charged and the punishment fixed by law for these crimes.

The defendant's counsel is granted leave to withdraw and the judgment of conviction is affirmed.

Affirmed.

Schwartz and McNamara, JJ., concur.

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V 114 page
114 I.A. 2nd 383

No. 53007

IN RE: ESTATE OF THEODORE B. DUKES.)	
)	APPEAL FROM THE
MAGGIE OLIVER,)	
Plaintiff-Appellant,	)	CIRCUIT COURT
)	
	)	OF COOK COUNTY.
v.)	
)	
MATTIE DUKES WILLIAMS,	)	HON. JOHN PAVLIK
Defendant-Appellee.	)	PRESIDING.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

In what purports to be a petition under Section 72 of the Civil Practice Act (Ill. Rev. Stat., ch. 110, §72 (1967)) Maggie Oliver sought to vacate orders declaring Mattie Dukes Williams, the respondent, to be the sole heir to the estate of the decedent Theodore B. Dukes. The trial court sustained a motion by respondent to strike and dismiss the petition and petitioner thereupon took this appeal. The briefs of the parties do not state with any clarity either the facts or the legal issues. It appears however that the petitioner seeks to establish that because of fraud on the part of the respondent the court was without jurisdiction to enter an order determining heirship. The facts as far as we can glean them from the briefs and record follow.

Theodore B. Dukes died on January 10, 1964 and on January 21, 1964 the respondent petitioned the Probate Court of Cook County for letters of administration. She alleged that she was Dukes' only heir-at-law. On proof of heirship she testified that she was one of the children of Dr. and Mrs. G.D. Dukes, parents of the decedent, thus making her the decedent's sister. On December 18, 1964 she appeared to amend the proof of heirship and testified that she had been

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adopted by decedent's parents and thus was legally a sister of the decedent. On August 3, 1965 the court entered an order declaring the respondent to be the decedent's sister by adoption and his heir-at-law. On November 12, 1967 the court approved the final accounting and closed the estate of Theodore B. Dukes.

On December 1, 1967 a petition was filed under Section 72 seeking to vacate the court's order. Petitioner alleged that the true heir to the estate of Theodore B. Dukes was one Rose Daniels, the sister of Dukes' mother, that Rose Daniels had died, leaving her husband Willie Daniels as her only heir and that he had also died, leaving the petitioner, his sister, as his only heir. She also charged that the respondent was neither the natural nor the adopted daughter of G.D. Dukes and that respondent had committed perjury when she testified that she was. Petitioner alleged finally that in the years 1939 and 1941 the United States District Court for the Eastern District of Arkansas had entered orders finding that the respondent was not legally adopted by Dr. Dukes and that those orders were entitled to full faith and credit by the Illinois courts.

Respondent filed a motion to strike and dismiss the petition, together with two documents in support thereof. The first was an assignment by petitioner to James Gibson, dated April 12, 1965 of all her interest in the estate of Willie Daniels. The second was the order of the United States District Court, Eastern District of Arkansas, dated August 8, 1967, holding that the 1939 and 1941 orders of that court do not cast a cloud on the validity of the adoption proceedings of the respondent by Dr. G.D. Dukes or on her status as an heir-at-law of Theodore B. Dukes.

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Petitioner contends that the court which entered the declaration of heirship and closed the estate of Theodore B. Dukes was without jurisdiction in those matters and that its orders were void. She alleges that respondent's testimony that she was a child of Dr. Dukes was proven false by her subsequent testimony that she had been adopted. She further alleges that the two Arkansas District Court orders dated 1939 and 1941 found that respondent was not legally adopted by Dr. Dukes and that those orders must be afforded full faith and credit. Petitioner argues that respondent's testimony was fraudulent and that as a result the court was without jurisdiction to enter its orders.

Respondent never testified that she was a natural child of Dr. Dukes. Her original testimony as to heirship was that she was a child of decedent's parents, which she later clarified by testifying that she was an adopted child. The United States District Court in its order of 1967 specifically found that the 1939 and 1941 orders did not "cast any cloud on the validity of the adoption proceedings or on the status of Mattie Dukes Williams as the adopted daughter of G.D. Dukes and as an heir-at-law of T.B. Dukes, deceased."

Moreover, petitioner has no interest in the estate of Theodore B. Dukes and had no such interest at the time she filed her petition. She had transferred any interest she might have had to James Gibson by the assignment dated April 12, 1965. The court properly dismissed the petition and the judgment is affirmed.

JUDGMENT AFFIRMED

DEMPSEY, P.J. and McNAMARA, J.
concur.

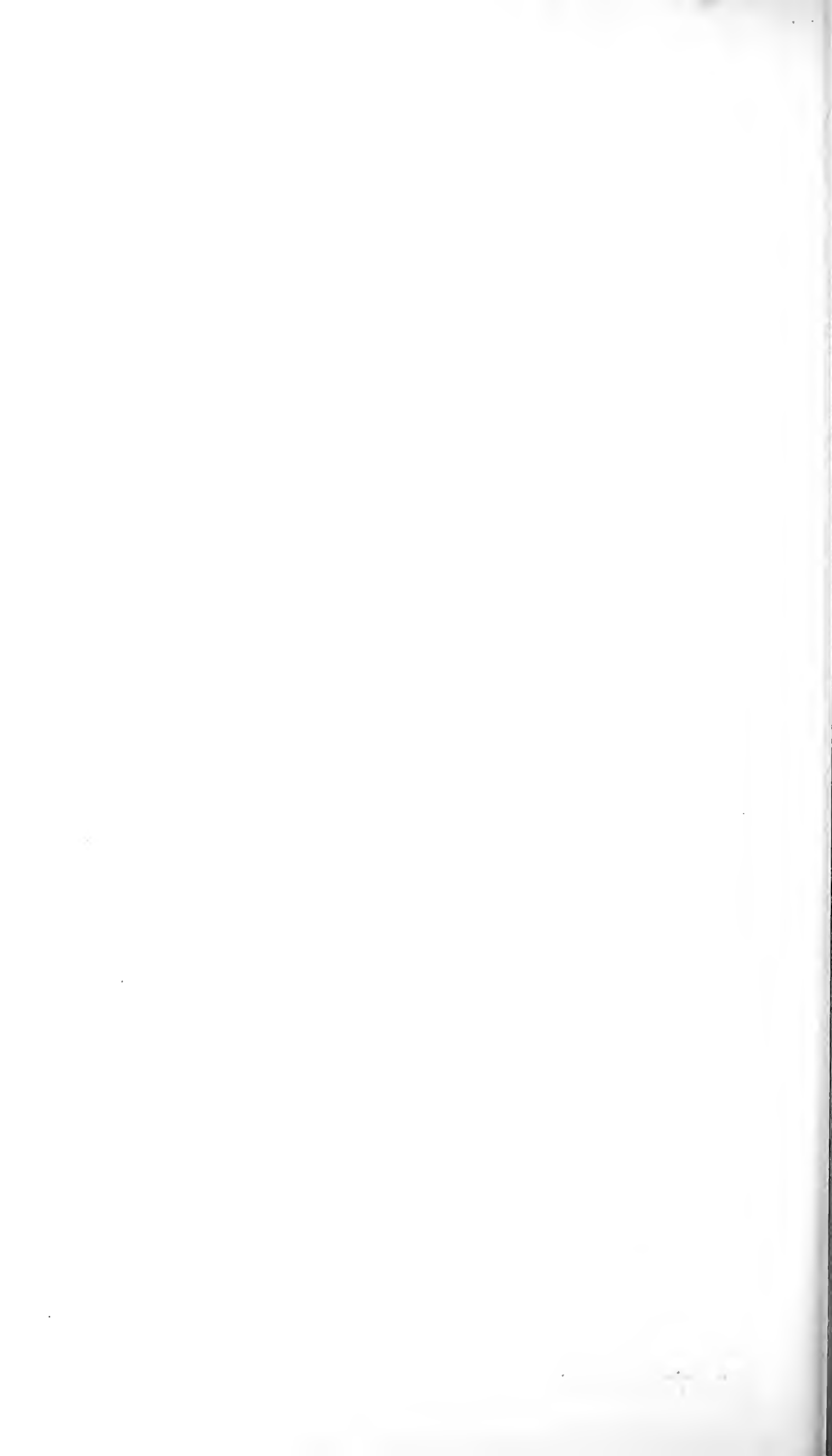
52829

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,) APPEAL FROM
)
 v.) CIRCUIT COURT,
)
) COOK COUNTY.
)
 TOMMY IRBY,) Honorable Benjamin Schwartz
) Judge Presiding.
 Defendant-Appellant.)

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

In a bench trial of a 2-count indictment, defendant was found guilty of the offenses of attempt to commit robbery and attempt to commit murder. On each count he was sentenced to the penitentiary for a term of five to twelve years. On appeal defendant contends that he was not proved guilty beyond a reasonable doubt, and that the minimum sentence is excessive.

The prosecuting witness, Sam Geroulis, testified that he was the owner of a liquor store and tavern in Chicago. On March 12, 1967, at about 1:30 A.M. the defendant and another man entered the tavern. He had never seen defendant before. Defendant alternately played pool and went to the washroom. At the pool table the defendant provoked arguments with other people playing. At approximately 2:40 A.M., with about twenty to twenty-five people in the tavern, defendant came out of the washroom with Ross and Dennis, and they all walked toward the front of the tavern. Geroulis was standing at a display counter and to his right, about six feet away, was L. C. Falconer, a bartender. When defendant was directly across from Geroulis and about eight feet away, defendant pulled a gun and said, "Hands up," and "Stick 'em up." As Dennis searched Falconer, the defendant fired at Geroulis. The bullet missed Geroulis and broke five pints of liquor behind him. Geroulis shot back at defendant, who then ran out of the tavern. At gunpoint Geroulis backed Ross and Dennis



into the washroom, and the police were called. Geroulis was previously acquainted with Ross, who was in the tavern when the defendant and Dennis arrived. Later Geroulis and Falconer picked out the defendant's picture from pictures shown to them by the police.

The bartender, L. C. Falconer, testified that he arrived at the tavern about 2:30 A.M. on March 12, 1967. Defendant, with Dennis and Ross, came out of the washroom while Falconer and Geroulis were behind the bar and announced, "This is a stickup." Dennis searched Falconer while the defendant held the gun on Geroulis. Defendant fired a shot at Geroulis, which hit the back of the bar. Geroulis shot at the defendant, who then fled. Falconer had not known defendant previously.

The defendant testified that he had been in Geroulis' tavern "thousands of times" before the night of March 12, 1967. He knew Geroulis for eleven or twelve years and had purchased wine on credit in the past. After entering the tavern on March 12, the defendant, while drinking, noticed that Ross had a gun. He got into a disagreement with Ross over a game of pool. He then noticed, while asking Geroulis for another beer, that his money was missing. Finding Ross in the washroom, defendant knocked him down, took his gun and told him to come outside. After they left the washroom, Geroulis shot the defendant in the hand. The defendant then ran out.

In support of defendant's contention that he was not proved guilty beyond a reasonable doubt, defendant asserts (1) there were serious discrepancies between the testimony of Geroulis and that of his bartender, Falconer; (2) the State failed to produce any of the twenty-five or so customers who were in the tavern at the time of the occurrence; and (3) the State's version of the night's events is highly improbable.

Defendant argues that Geroulis and Falconer were inconsistent in their testimony, in that Geroulis testified that

he was standing by the beer display case at the time of the shooting and Falconer testified they were both standing behind the bar. Also, Geroulis testified that defendant's shot hit the display case, while Falconer testified that it hit the back of the bar. Defendant contends the cause for these misstatements is that Geroulis fired at the defendant from the bar, in anger, for disturbing the peace of the tavern, and being fearful of the loss of his license, sought to "cover up," and seeing two men who stood near defendant, proceeded to have them arrested as though they had participated in an attempt of robbery. Defendant also asserts that Geroulis coached Falconer as to what to say.

On this point we agree with the State that the testimony of Geroulis and Falconer was clear and consistent, and any discrepancies in their testimony were minor and did not render their testimony unworthy of belief. People v. McAfee, 80 Ill. App.2d 142, 145, 225 N.E.2d 74 (1967).

Defendant next contends that the unexplained failure of the State to call any of the customers who were in the tavern during the occurrence gave rise to an inference against the State. People v. Strong, 21 Ill.2d 320, 325, 172 N.E.2d 765 (1961).

The State asserts that its failure to call any of the tavern customers did not lessen the credibility of the testimony of Geroulis and Falconer. The State points out that Geroulis said the other patrons were running toward the back of the tavern when Irby announced that it was a "stick-up," and as these patrons had no unique knowledge of the event, their failure to testify did not give rise to a presumption that their testimony would have been unfavorable to the State. We agree. See People v. Jones, 30 Ill.2d 186, 190, 195 N.E.2d 698 (1964).

Defendant finally asserts that the total circumstances made it highly improbable that defendant would attempt to hold up Geroulis' tavern. In support he poses the following questions: Why should he stay two hours in a place, then hold it up after

becoming known to the owner and patrons? Why should the other two have stood by when defendant fled, allowing themselves to be arrested? Why should defendant, assuming he was not known to the owner, have chosen Ross, who was known to the owner, as his partner in crime? Why should he have fired at Geroulis without the slightest provocation? In point defendant cites People v. Coulson, 13 Ill.2d 290, 296, 149 N.E.2d 96 (1958), where it is said:

"The conviction in this case is based on the testimony of Bailey, the only witness to the alleged robbery * * *. This testimony taxes the gullibility of the credulous. * * * In each case we held that the testimony was too improbable and unconvincing to sustain a conviction. Where testimony is contrary to the laws of nature, or universal human experience, this court is not bound to believe the witness."

Defendant also cites People v. Reese, 34 Ill.2d 77, 80, 213 N.E.2d 526 (1966):

"We attach great weight to the findings of the trier of fact, including his appraisal of the credibility of witnesses, but they are not conclusive and it is our duty to set a conviction aside where the evidence is so unsatisfactory as to raise a reasonable doubt of a defendant's guilt. * * * In our opinion the totality of the circumstances here leaves a reasonable doubt as to the defendant's guilt and the conviction cannot stand."

The State asserts that in determining the credibility of witnesses, including a defendant who elects to testify in his own behalf, the trier of fact may take into consideration, among other things, "the probability or improbability of the truth of his statements in the light of human experience." (People v. Malmenato, 14 Ill.2d 52, 59, 150 N.E.2d 806 (1958).) The State submits that the testimony of the defendant is so improbable as to be unbelievable, and that the testimony of Geroulis and Falconer, while somewhat different as to minor points, is clear and convincing.

As we view this record, the only issue is the credibility of the witnesses. In People v. West, 15 Ill.2d 171, 176, 154 N.E.2d 286 (1958), it is said:

"Where a cause is tried by the court without a jury, the determination of the credibility of the witnesses and the weight to be accorded to their testimony is committed to the trial judge, * * * and unless it can be said the court's judgment is found to rest on doubtful, improbable and unsatisfactory evidence, or clearly insufficient evidence, a reviewing court will not substitute its judgment for that of the court below even though evidence regarding material facts is conflicting and irreconcilable."

In applying the foregoing guidelines here, we find no basis for substituting our judgment for that of the trial court. The record as a whole does not contain inconsistencies or improbabilities that leave a reasonable doubt as to defendant's guilt. We conclude that the defendant has been proved guilty beyond a reasonable doubt of both offenses.

Next considered is defendant's contention that the minimum sentence is excessive. The defendant had four prior convictions by the time he was twenty-four years old. While on parole he was found guilty of attempted robbery and attempted murder. We find no reason to disturb the minimum sentence here, which is within the statutory limits. In the absence of anything affirmative in the record, it is ordered that the sentences for both offenses be served concurrently.

For the reasons given, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

ADESKO, P.J., and BURMAN, J., concur.

Abstract only.

V 114 page 420
53468

114 I.A.

2nd 420

PEOPLE OF THE STATE OF ILLINOIS,)
) APPEAL FROM
Plaintiff-Appellee,)
) CIRCUIT COURT,
v.)
) COOK COUNTY.
)
THOMAS DENNIS (Impleaded),) Honorable Ben Schwartz
)
Defendant-Appellant.) Judge Presiding.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

In a bench trial of a 2-count indictment, defendant was found guilty of the offenses of attempt to commit robbery and attempt to commit murder. On each count he was sentenced to the penitentiary for a term of three to eight years, to be served concurrently. On appeal defendant contends that the trial court erred in accepting his jury waiver.

The prosecuting witness, Sam Geroulis, testified that he was the owner of a liquor store and tavern in the City of Chicago. On March 12, 1967, at approximately 1:30 A.M., defendant and Tommy Irby entered the tavern, and he served them beer. At approximately 2:40 A.M., with about twenty to twenty-five people in the tavern, Irby, with a gun in his hand, said, "Stick 'em up." Defendant went behind the bar and searched the bartender. Irby then fired his gun at Geroulis, who pulled out a gun and fired back at Irby, who ran out of the tavern. Geroulis ordered defendant and a man named Ross [whom he knew] to go into the washroom and told his bartender to call the police, who came and arrested the defendant and Ross. The bartender, L. J. Falconer, testified for the State and substantially corroborated the testimony of Geroulis.

Defendant testified that he had nothing to do with the robbery. He did not search the bartender, and the man who fired at the owner of the tavern was not a friend of his. He was playing pool when he heard the commotion and shooting.

At the trial defendant was represented by Stanton Bloom, an assistant public defender. The report of proceedings shows that when the case was called for trial, the following took place:

The Court: Oh, yes, do you want a waiver signed?

Mr. Bloom: It has been signed already.

The Court: You did sign a jury waiver, did you not?

Defendant Dennis: Yes, sir.

The Court: And you recall that you signed it?

Defendant Dennis: Yes, sir.

The Court: And you want to be tried by the Court?

Defendant Dennis: Yes, sir.

The Court: All right. And you realize that you have a right to a jury trial?

Defendant Dennis: Yes, sir.

The Court: And you waive it and you want to be tried by this Court?

Defendant Dennis: Yes, to be tried now.

The Court: Okay. Let us proceed.

Defendant asserts that the foregoing demonstrates that he did not understandingly waive his right to a jury trial, and "by no stretch of the imagination can it be said that the questions and answers given on this matter of a jury trial waiver meet the requirements of the statute or the decisions. There was no explanation whatsoever of the meaning and significance of a trial by jury. There was no explanation that at a bench trial the court could sentence the defendant for a term of years in the penitentiary for the number of years specified by the Criminal Code. No evidence appears that the defendant understood his rights. The only statement made was that he was advised that he had a right to a jury trial. This statement does not prove that he knew what a jury trial meant or what a bench trial meant. Nor does this statement constitute an explanation of the functions of a jury trial. There is no evidence that his counsel explained the significance of a jury



or a bench trial. The statements of the court do not constitute an explanation of the defendant's rights and cannot be considered as statements or advice which prove that the waiver by the defendant of a jury trial was understandingly made."

Defendant's authorities include People v. Wesley, 30 Ill.2d 131, 133, 195 N.E.2d 708 (1964), where it is said:

"It has long been established that the State and Federal constitutional requirement of a jury trial is not jurisdictional, but is, rather, a privilege which a defendant may waive with the consent of the court, provided the waiver is expressly and understandingly made. * * * Equally well settled is the principle that it is the duty of the trial court to see that the election to forego a jury trial is expressly and understandingly made by an accused. * * * There is no specific or defined formula which the trier of fact is to follow, or from which to judge whether a waiver is understandingly made, and we believe of necessity that the determination must rest upon the facts of each particular case."

We agree that the trial court has the duty to see that an accused person's election to waive a jury trial is not only expressly but also understandingly made, and the performance of that duty cannot be perfunctorily discharged. If the jury waiver here was not understandingly made, this record does not demonstrate it. The colloquy between court, defendant's counsel and defendant definitely shows that defendant knew he had a right to a jury trial, which he desired to waive and to have his case tried by the court without a jury. Also, the trial court was entitled to rely on the professional responsibility of defendant's attorney that when he tendered to the court defendant's jury waiver, it was knowingly and understandingly executed by his client. Defendant is not permitted to claim an alleged error which was invited by his behavior and that of his attorney. (People v. Novotny, 41 Ill.2d 401, 408-9, 244 N.E.2d 182 (1968); People v. King, 30 Ill. App.2d 264, 268, 174 N.E.2d 213 (1961).) We are not persuaded that the defendant did not know what it was all about and find that defendant's election to waive a jury trial was expressly and understandingly made by the defendant.

We find nothing in this record to justify the reversal of defendant's conviction. Therefore, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

ADESKO, P.J., and BURMAN, J., concur.

Abstract only.

114 I.A. 2nd 477

Nos. 53603, 53604, 53605 - Consolidated.

PEOPLE OF THE STATE OF)	
ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,)	
	)	CIRCUIT COURT OF
)	
v.	)	COOK COUNTY.
)	
)	
JOHN LOCKLUND,	)	HON. HARRY S. STARK
Defendant-Appellant.	)	PRESIDING.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Defendant was charged in separate indictments with the offenses of theft of property exceeding \$150 in value, burglary and jumping bail. He entered pleas of not guilty and the Public Defender was appointed as his counsel. On February 26, 1968 the defendant informed the court that he wished to change his plea of not guilty to guilty as to each of the offenses. The trial judge questioned him regarding his change of pleas and asked whether he understood that by entering pleas of guilty, he waived his right to a jury trial. Defendant answered that he understood. The judge then informed defendant of the penalties which he could impose for each charge and asked whether he still persisted in his pleas of guilty. Defendant answered affirmatively. The court entered judgment on the pleas and a hearing was held in aggravation and mitigation. Defendant was sentenced to serve a term of one to three years in the penitentiary for each offense, the sentences to run concurrently. Defendant filed a notice of appeal as to all three convictions and the Public Defender was appointed to represent him.

The Assistant Public Defender assigned to the appeal filed the record on appeal, but now files a motion for leave

Nos. 53603, 53604, 53605 - Consolidated

to withdraw from the case on the ground that after a careful examination of the record he has concluded that an appeal would be wholly frivolous and could not possibly be successful. He filed a brief in support of the motion in which he concluded that from an examination of the record, the only possible charge of error which could be urged would be as to the trial court's admonishment to the defendant after defendant told the court of his wish to enter pleas of guilty. We agree with the Public Defender that the record establishes beyond question that the court's admonishment was more than adequate and that an appeal as to that point would be frivolous. Ill. Rev. Stat., ch. 38, §115-2(a) (2) (1967); People v. Kontopoulos, 26 Ill. 2d 388, 186 N.E.2d 312; People v. Wilke, 390 Ill. 598, 62 N.E. 2d 468.

On March 28, 1969 defendant was notified by this court of the Public Defender's motion to withdraw and was sent copies of that petition and the brief in support thereof and was instructed that he had until May 16, 1969 to file any points he might choose in support of his appeal. The defendant has failed to file any such points.

We have thoroughly considered the Public Defender's brief in support of his motion to withdraw and have made a full examination of all the proceedings in accordance with the requirements of Anders v. California, 386 U.S. 738 (Cal., 1967), and People v. Carter, 92 Ill. App. 2d 120, 235 N.E.2d 382. We conclude that the appeal is wholly frivolous and that the Public Defender should be allowed to withdraw. The appeal is dismissed and the judgments of conviction are affirmed.

JUDGMENTS AFFIRMED

DEMPSEY, P.J. and McNAMARA, J.
concur.

114 I.A. 2nd 484

IN THE MATTER OF THE ESTATE OF
GERTRUDE MACDONALD, Incompetent.

* * * * *

vs.

Defendants-Appellees.

Honorable Robert Jerome Dunne,
Judge Presiding.

On the same day Jean MacDonald filed pro se her "Petition for Change of Venue from all the Judges of Cook County and for a Referral of this case to the Illinois Supreme Court for Reassignment to a Judge Outside of Cook County". In it



she states that she "appears individually, as Successor Trustee under the last will of Dr. Charles MacDonald, deceased, as sister-in-law to Gertrude MacDonald, the alleged incompetent, and as widow of the late James Middleton MacDonald, said Gertrude and James each being the equitable owner of one-half undivided beneficial interests under the terms of said Trust". The petition was accompanied by petitioner's affidavit in support, alleging the prejudice of Cook County Judges, and in which she alleges improprieties in the numerous court proceedings in which the real estate of Gertrude MacDonald was involved and alleges that the petition for instruction is a threat to the property in which petitioner resides with her sister-in-law Gertrude MacDonald and avers the property is "a homestead purchased by affiant and her husband with their own funds in September of 1941" and fears that she will be denied a full, fair and impartial hearing in Cook County "on the real and basic issues from which this case stems and may once again be held in contempt of court and sent to jail".

The court after being fully advised in the premises, on July 31, 1967, entered its order (1) authorizing continued weekly payments for support of the ward, (2) directing the Conservator to cause either a new appraisal to be made or the most recent one brought up to date, for the purpose of sale, (3) on its own motion appointing the Public Guardian as Conservator of the Person of the ward and directing that as Conservator of the Person of the ward the Public Guardian have the ward examined by a physician of the Public Guardian's choice to determine the ward's physical condition, (4) finding Jean MacDonald not a party to the administration of the estate and denying her petition for change of venue, (5) finding Jean MacDonald present in open court advises her not to interfere with the physical examination of the ward, directed in (3), and (6) denying a motion of Jean MacDonald to file additions to her affidavit in support. From this order Jean MacDonald has perfected her appeal.

Appellant seeks to relitigate matters that have long been finally decided by the Courts at the trial level and on appeal. They will not here be reconsidered. Appellant has no right to term herself as Trustee under the will of Charles MacDonald, deceased,

because by proceedings affirmed in *La Salle National Bank v. Jean MacDonald*, 2 Ill. 2d 581, that trust was terminated and Jean MacDonald removed as trustee. The property involved is the sole property of Gertrude MacDonald, *La Salle National Bank v. Jean MacDonald*, 27 Ill. 2d 171, and as a result Jean MacDonald has no interest in the property as either the sister-in-law of Gertrude MacDonald or the widow of James Middleton MacDonald. Her co-occupancy of the property involved has not made her a party to the proceedings from which she seeks to here appeal.

Since appellant was not a party to these proceedings and had no legal interest in them, her status with reference to a petition for change of venue, was identical to that of any stranger who might have walked into the courtroom and presented a similar petition in these proceedings. Only a Party to the action or proceeding may apply for a change of venue. I.L.P., Venue, §12, and cases cited therein.

From the record it appears that after appellant filed her notice of appeal in this cause, the Conservator of the person of Gertrude MacDonald filed a petition for rule to show cause, alleging that a physician employed by her, pursuant to the order of July 31, 1967, was not permitted by Jean MacDonald to examine Gertrude MacDonald. The court then entered an order for Jean MacDonald to show cause why she should not be held in contempt of court for failing, neglecting and refusing to comply with the order and continued the matter pending the disposition of this appeal. In her brief, appellant raises as an issue the right of the trial court to retain jurisdiction to enter orders after notice of appeal has been filed. This record does not contain any appeal bond, the appeal does not operate as a supersedeas, and the judgment or order of July 31, 1967 may be enforced during the pendency of this appeal.

We therefore affirm the order of Circuit Court of Cook County, entered in its Probate Division on July 31, 1967.

Affirmed.



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5/5/73	Alvin K. Smith	013-210
10/3/73	Alvin K. Smith	332-0489
12/22/73	Alvin K. Smith	329-5680
4/23/75	Alvin K. Smith	FR-3735
	Alvin K. Smith	FR-23735
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N. MANCHESTER,
INDIANA

